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In the Supreme Court
OF THE
United States

OCTOBER TERM 1969

No. 1

HARVEY FRANKLIN FARMER,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Real Party in Interest.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

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PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of California

Petitioner, Harvey Franklin Farmer, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above-entitled case (1 Civil No. 27,563) on January 4, 1970.

Petitioner respectfully requests that this petition for a writ of certiorari be considered with petitioner's previous motion for leave to file petition for a writ of mandate and petition for a writ of mandate heretofore filed in this Court to be heard in the October Term, 1970, as No. 1634 Misc. Petitioner is filing both for a writ of mandate and a writ of certiorari, hoping to obtain the Court's review on the peculiar questions involved in view of California procedure making mandate the only appropriate remedy (§400, Code of Civil Procedure).

OPINIONS OF THE COURTS BELOW

The Superior Court of the State of California in and for the County of Alameda granted the motion of Great Northern Railway Company to dismiss on the basis of forum non conveniens an action for personal injuries arising out of an accident occurring in the State of Idaho instituted by Harvey Franklin Farmer as an injured employee of the Great Northern Railway Company under the Federal Employers' Liability Act. The record shows without conflict that Great Northern runs a line of railroad and does business in California and is a resident of California for venue purposes. This motion to dismiss was granted without opinion.

The factual situation raised by the pleadings and the affidavits presented the simple issue as to whether an F.E.L.A. plaintiff can pursue his admitted right to select the venue and pursue the suit against his

employer railroad where the employer runs a line of railroad and is resident for federal venue purposes:

(1) Where the plaintiff makes an uncontradicted showing of clear liability so that no convenience of defense witnesses is really involved as to liability, and

(2) The only issue is the conflict in medical testimony between doctors selected by the plaintiff in California and the railroad company doctor who resides outside the forum.

On this state of facts was the lower court justified in dismissing the case by applying the maxim of forum non conveniens?

Under §400, California Code of Civil Procedure, application for a writ of mandate was duly filed with the Court of Appeal, First Appellate District, Division 1, and the writ was denied without opinion.

Then similar application for a writ of mandate was promptly made to the Supreme Court of California and that petition was denied without opinion. Thus the matter now stands as a final judgment of the Supreme Court of California that the case is dismissed.

JURISDICTION

Jurisdiction of the Supreme Court of the United States is invoked because the case involves the interpretation of an important statute, and this interpretation is in conflict with *Pope v. Atlantic Coast Lines Railroad Co.*, 345 U.S. 379, 96 L.Ed. 1094, 73 S.Ct. 749, which holds that there is no statutory authority

for a state court to dismiss an F.E.L.A. case properly brought under §6 of the Act (45 U.S.C.A. §56).

Under Article IV and Amendment 14 of the United States Constitution, the privileges and immunities clause forbids the state from discriminating against non-resident creditors of a foreign corporation permitted to transact business in the state. California has held that an F.E.L.A. claim creates a debtor-creditor relation in which a transitory action can be brought in California.

McKnett v. St. Louis and S.F. Ry. Co., 292 U.S. 230, 78 L.Ed. 1227;

Kelly v. Knott, 163 Southern 64, citing the applicability of United States Supreme Court cases;

Estate of Waits, 23 Cal.2d 676, 146 Pac.2d 5.

MANDATE IS THE APPROPRIATE REMEDY

State Farm, etc., Ins. Co. v. Superior Court, 47 Cal.2d 428, 432;

§400 Code of Civil Procedure.

Judgment is final because the case will stand dismissed if this appeal does not reverse it.

The United States Supreme Court has held that mandamus is the traditional writ to compel a Court "to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 87 L.Ed. 1185, 1190; *La Bay v. Howes Leather Co.,* 352 U.S. 249, 1 L.Ed. 290.

DECISION IN THIS CASE IS CONTRARY TO THE LEGISLATIVE INTENT

We have covered the principal points in detail in the memorandum attached to the exhibits. Here are the main reasons the Court should consider, review and decide the case:

The Federal Employers' Liability Act gives the plaintiff the choice of venue (45 U.S.C.A. §56). The Act specifically says the action may be brought where "the defendant shall be doing business at the time of commencing such action." The legislative intent was expressed by Senator Borah of Idaho, who was in charge of Senate Report No. 4320 H.R. 17263, 61st Congress, Second Session, 45th Congressional Record (1910) 4034:

> "The bill enables the plaintiff to find a corporation at any point or place or state where it is actually carrying on business and there lodge his action if he chooses to do so."

In *Baltimore and Ohio R. Co. v. Kepner,* 314 U.S. 44, 86 L.Ed. 28, this Court held that §6 of the F.E.L.A. creates the venue as a matter of federal privilege and that a denial of this federal privilege is governed by federal and not by state law. Mr. Justice Reed speaks of the legislative intent as follows:

> "The language finally adopted must have been deliberately chosen to enable the plaintiff in the words of Senator Borah, who submitted the report on the bill, 'to find the corporation at any point or place or state where it is actually carrying on business, and there lodge his action, if he chooses to do so.'"

At page 33 of the Lawyers' Edition, the Court in the *Kepner* case said:

> "The privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910 for the benefit of employees."

Similarly, in the case of *Miles v. Illinois Central R.R. Co.*, 315 U.S. 698, 86 L.Ed. 1129, Mr. Justice Reed in reaffirming the *Kepner* case, supra, stated:

> "The opportunity to present causes of action under the F.E.L.A. in the state courts came, however, not from the state law, but from the federal . . . this is so because the federal constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and enforceable wherever jurisdiction is adequate for the purpose."

Mr. Justice Jackson in his concurring opinion stated:

> "Unless there is some hidden meaning in the language Congress has employed, the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in either a federal or a state court in which to ask his remedy. There is nothing which requires the plaintiff to whom such a choice is given to exercise it in a self-denying or large-hearted manner.
>
> "It seems more probable that Congress intended to give the disadvantaged workman some leverage

in the choice of venue than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principal lawsuit elsewhere."

JUDICIAL CODE 1404(a) ALLOWING TRANSFER IN FEDERAL COURTS "DOES NOT SPEAK TO STATE COURTS."

The opposition rely upon *Missouri v. Mayfield,* 340 U.S. 1, 95 L.Ed. 3, which was a five to four decision and which depended on the concurring opinion of Mr. Justice Jackson, who limited its application to allow a transfer of the case in the federal court because of the 1948 revision of the Judicial Code, Title 28, 1404(a), U.S.C.A. It is to be noted that this is really the only effect of *Missouri v. Mayfield,* supra, because in *Pope v. Atlantic Coast Lines R.R. Co.,* 345 U.S. 379, 97 L.Ed. 1094, 73 S.Ct. 849, the United States Supreme Court clarified the effect of *Mayfield* and held that the *Kepner* and *Miles* cases were still controlling as to cases in the state court. In *Pope,* Chief Justice Vinson says that 1404(a) of the Judicial Code, allowing a transfer of an F.E.L.A. case only speaks to federal courts—"it does not speak to state courts." He points out that Congress might have applied a similar law to state courts by limiting the employee's choice of venue to the place of his injury or to the place of his residence. He points out that the Jennings bill sought to do this, but this bill did not become law. Consequently, he holds that the state

court could not enjoin its resident from bringing an alleged vexatious suit in a foreign forum for jurisdiction and concludes:

> "Since the narrow question in this case is simply whether the Miles case is still controlling; since we find no legislation which has devitalized it in any way, and since we find affirmative evidence that Congress chose to let it stand, the judgment below must be reversed."

Mr. Justice Frankfurter in his dissenting opinion characterizes the majority opinion ". . . as an iron restriction not to be touched beyond the literal scope of its Congressional rejection," and he concedes that the majority opinion adheres to *Kepner-Miles.* There is no statute giving state courts the right to transfer or dismiss, and the passage of 1404(a) of the Judicial Code shows that a statutory provision was required to give the federal courts limited rights to transfer, but not to dismiss.

FEDERAL LAW GOVERNS

In *Dice v. Akron, C. & Y. R. Co.,* 342 U.S. 359, 96 L.Ed. 398, 72 S.Ct. 312, Mr. Justice Black held that

> ". . . only if federal law controls can the federal act be given that uniform application throughout the country essential to effectuate its purpose . . . Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Acts Administration, [and so he held that a jury trial is] 'part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.' And he held

that to deprive them of this 'is to take away a good portion of the relief which Congress has afforded them.'"

Similarly, in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 22 L.Ed.2d 344, this Court held that the need for uniformity in enforcing the Railway Labor Act prevents the exercise of state authority which might impose inconsistent standards or judicial legislation.

In spite of the fact that Governor Earl Warren vetoed California Senate Bill 789 providing for a forum non conveniens and that Congress refused to pass the Jennings Bill which was H.R. 1639, 80th Congress, First Session, providing that the plaintiff must sue where the accident happened, we are now told that the California court can by judicial legislation achieve what railroads and their lobbies failed to gain by legislative action. This judicial legislation is justified by invoking the so-called maxim of "forum non conveniens." Detailed consideration of this maxim reminds one of Dean Pound's wise comment that "most maxims should be called minims, as they compress a minimum of sense into a maximum of pretentiousness."

In California, for example, after holding in *Price v. A.T. & S.F. Ry. Co.*, 42 Cal.2d 577, 268 Pac.2d 457, that the maxim of "forum non conveniens" could be considered, Mr. Justice Peters, in speaking for the California court in *Thomson v. Continental Insurance Co.*, 66 Cal.2d 738, held that the maxim of forum non conveniens does not apply where the plaintiff is a

California resident, and that "the doctrine is typically applied to litigation where all of the parties are out-of-state residents and where the cause of action arose outside the forum state."

AN F.E.L.A. CASE IS A TRANSITORY ACTION RECOGNIZED BY THE CALIFORNIA SUPREME COURT AS A DEBTOR-CREDITOR RELATIONSHIP TO BE ENFORCED WHEREVER THE DEBTOR CAN BE FOUND

In the *Estate of Waits,* 23 Cal.2d 676, 146 Pac.2d 5, Mr. Justice Traynor, speaking for the California court, held that the Federal Employers' Liability Act creates a debtor-creditor relationship; and the debt being transitory may be enforced wherever the debtor can be found. As to this, he said, "It would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action."

By a parity of reasoning where the legislative intent, as expressed by Senator Borah, who was in charge of the bill in the Senate, is to allow the plaintiff to "lodge his action wherever the railroad could be found carrying on business," it would be idle to allow such lodging of the action and not permit the trial court to proceed with the action. This would be a definite rejection of the obvious intention of the legislature in providing for this broad and liberal selection by the plaintiff.

In making the decision in the *Estate of Waits,* supra, Mr. Justice Traynor relied on the opinion of Mr. Justice McKenna in the case of *American Rail-*

road Company v. Birch, 224 U.S. 547, 32 S.Ct. 603, 56 L.Ed. 879. In this *Birch* case, Mr. Justice McKenna said that in giving the right to the personal representative, Congress did not give the right to the widow to sue:

> "That the words of the Act will not yield to such liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or 'in case of death . . . to his or her personal representative.'
> ". . . This distinction between the parties to sue and the parties to be benefited by the suit makes clear the purpose of Congress. To this purpose we must yield."

In *McGovern v. Philadelphia & Reading R.R. Co.,* 235 U.S. 389, 59 L.Ed. 283, there was an action under the F.E.L.A. brought by the personal representative in the U.S.A. for the benefit of surviving relatives who were non-resident aliens residing in Ireland. The lower court had held that since the non-resident aliens were the beneficiaries, the resident personal representative could not maintain the action. Mr. Justice McKenna took a more liberal view and said:

> ". . . the policy of the Employers' Liability Act accords with and finds expression in the universality of its language. Its purpose is something more than to give compensation for the negligence of railroad companies.
>
> "The rights and remedies of the statute are the means of executing its policy. If this 'puts burdens on our own citizens for the benefit of non-resident aliens,' . . . it is a burden imposed for wrongdoing that has caused the destruction of

> life. It is for the protection of that life that compensation for its destruction is given and to those who have relation to it. These may be the wife, children, or parents. The statute, indeed, distinguishes between them, but what difference can it make where they may reside? It is the fact of their relation to the life destroyed that is the circumstance to be considered, whether we consider the injury received by them or the influence of that relation upon the life destroyed."

The above decision of the Supreme Court of the United States shortly after the enactment of the Federal Employers' Liability Act is in line with the other cases decided by the United States Supreme Court that the law is to be given a liberal construction in order to accomplish its humanitarian and remedial purposes and to advance the remedy for the protection of the railroad employee.

See *Urie v. Thompson,* 69 S.Ct. 1018, 337 U.S. 163, 93 L.Ed. 1282; 11 A.L.R.2d 252; *Coray v. Southern Pacific,* 69 S.Ct. 275, 335 U.S. 520, 93 L.Ed. 208.

THE PRIVILEGES AND IMMUNITIES CLAUSES OF ARTICLE IV AND THE 14TH AMENDMENT PREVENT CALIFORNIA FROM DISCRIMINATING AGAINST AN F.E.L.A. CREDITOR SUING A RESIDENT DEBTOR ON RIGHTS ARISING OUT OF FEDERAL LAWS.

In line with the view that the right of action is regarded as having a situs as for a debt in each jurisdiction where the plaintiff is authorized to maintain his suit, it makes no difference whether the plaintiff is resident, or non-resident, as the debtor can always

be sued at his residence, or where he can be found, or where he runs a line of railroad under §6 of the F.E.L.A. Under this rule there is no basis for assigning the cause of action to any particular locality. "The location assigned to it depends on what action is to be taken with reference to it." (*Estate of Waits,* supra.) From this point of view, the case of *McKnett v. St. Louis & S.F. Ry. Co.,* 292 U.S. 230, 78 L.Ed. 1227, applies:

> "The privileges and immunities clause requires a state to accord the citizens of other states substantially the same right of access to its courts as do the courts to its own citizens . . . The plaintiff is cast out because he is suing to enforce a federal act. The state may not discriminate against rights arising out of federal laws."

See also *Kelly v. Knott* (Fla.), 163 Southern 64 (reversed on other grounds, 298 U.S. 544, 80 L.Ed. 1321; mandate conforms to 168 Southern 416):

> "We recognize, of course, the general rule that a state statute discriminating, or undertaking to discriminate, against non-resident creditors of a foreign corporation permitted to transact business in the state of Florida would be unavailing for such purpose, in view of these provisions of the Federal Constitution guaranteeing to citizens of each state the privileges and immunities of the several states. *Sully v. Am. Nat. Bank,* 178 U.S. 289, 20 S. Ct. 935, 44 L.Ed. 1072; *Blake v. McClung,* 172 U.S. 239, 19 S. Ct. 165, 43 L.Ed. 432; Id. 176 U.S. 59, 20 S. Ct. 307, 44 L.Ed. 371; *Maynard v. Granite State Provident Assn.,* 92 Fed. 435; *Clark v. Willard,* 292 U.S. 112, 54 S. Ct. 615, 78 L. Ed. 1160."

This same point of view is continued through the decisions of the United States Supreme Court up to and including the *Pope* case, with the only exception appearing in *Mayfield,* decided prior to *Pope,* and really only applying to 1404(a) of the Judicial Code as to federal courts, particularly in the light of the limitations later set forth in *Pope.*

Mr. Justice Black has wisely commented (*Francis v. S.P.,* 92 L.Ed. 798) as to judge-made maxims applying to statutory remedies:

> "Experience might prove that a rule created by judges should never have been created at all . . . or developments may arise which imperatively require its revision or abandonment. There are inherent dangers in judge-made laws. They should not create standards contrary to the legislative intent which may become a scandal and a hissing in the future."

CONGRESS NEVER INTENDED THAT AN INJURED F.E.L.A. PLAINTIFF WOULD HAVE TO TRY TWO CASES TO GET ONE DECIDED

Congress never intended that an injured F.E.L.A. plaintiff would have to try two cases to get one decided, and this maxim of forum non conveniens cries out for revision to avoid the result and to insure the application of Congressional intent stated by Senator Borah that the law "enables the plaintiff to find a corporation at any point or place or state where it is actually carrying on business and there lodge his action if he chooses to do so." Mr. Justice Traynor in *Estate of Waits,* supra, disposed of the argument that the plaintiff may then be transferred when he said:

> ". . . it would be idle to permit the appointment of an administrator and then have the trial court refuse to exercise its jurisdiction over the action."

It is equally idle for Congress to say plaintiff may lodge his action where he chooses, but the trial court can "refuse to exercise its jurisdiction over the action."

Way back in the time of Mr. Justice McReynolds, in *Denver & R.G.W.R. Co. v. Terte,* 284 U.S. 284, 76 L.Ed. 295, 297, the United States Supreme Court said:

> ". . . as a practical matter, courts could not undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the State and retain or refuse jurisdiction according to the relative inconvenience of the parties."

Today, as well as in 1931, as a practical matter, the Courts cannot undertake to ascertain in advance of trial the number and importance of probable witnesses within and without the state and retain or refuse jurisdiction according to the relative inconvenience of the parties. To do this intelligently, they would have to try the case and know all about the facts and relevant evidence, and some of the cases say they would have to have a "crystal ball" and an "apothecary's scale" to weigh the balance of admitted liability and testimony relating thereto as against the importance of medical testimony which might be available to the plaintiff in the forum but not elsewhere, particularly as to important items such as rehabilitation, future treatment, future disability, and percentages of disability.

Similarly, in *United States v. National City Lines*, 334 U.S. 573, 92 L.Ed. 1584, Mr. Justice Rutledge had occasion to discuss venue provisions applicable to anti-trust legislation which are similar to the venue provisions applicable to the F.E.L.A. In this regard, the Court said:

> "It was to provide broader and more effective relief, both substantively and procedurally, for persons injured by violations of its anti-trust policy. Insofar as convenience in bringing suit and conducting trial was involved, the purpose was to make these less inconvenient for plaintiffs or, as was said in the Eastman opinion, to remove the 'often insuperable obstacle' thrown in their way by the existing venue restrictions.
>
> "*To have broadened the choice of venue for the reasons which brought about that action, only to have it narrowed again by application of the vague and discretionary power comprehended by forum non conveniens, would have been incongruous, to say the least.* In making the change Congress did not authorize plaintiffs to institute civil anti-trust suits in the newly specified districts, merely in order to have them transferred back for trial to one of the districts comprehended by §7. It intended trial to take place in the district specified by the statute and selected by the plaintiff.
>
> ". . . Likewise the legislative discussions hereinafter cited uniformly treat the problem as one involving both instituting the suit and trying it. There is no hint that it was contemplated the two phases of the litigation might be separated and conducted in different places. . . .
>
> "Two important policy considerations were advanced by the Government, however, which not

only bear strongly upon that question but affect the question of power, if Congress had not concluded it. The first is that permitting the application of forum non conveniens to antitrust cases inevitably would lengthen litigation already overextended in the time required for its final disposition, and thus would violate Congress's declared policy of expediting this type of litigation.

". . . Although some instances of inconvenience to defendants will arise from the absence of discretionary power, that will be unavoidably true in almost any event. And it may well be doubted that the sum total of inconvenience and injustice resulting will be as great as would follow, for both private plaintiffs and the public, *from allowing the inescapable delay incident to the exercise of such a discretionary power.* For once the power were found to exist, it is more than likely that injection of the issue would become a common incident of antitrust suits, and create the disadvantage of delay for all concerned."

In the concurring opinion, Mr. Justice Jackson summarized the matter by saying:

". . . where choice of forum was authorized by special venue statute, this discretion to dismiss would not be implied."

This is still the law as to F.E.L.A. cases brought in the state Courts against a resident defendant. The only application of forum non conveniens would appear to be as stated by Mr. Justice Peters in the *Thomson* case, where both the plaintiff and the defendant are non-resident for venue purposes, and where the action happened without the forum. That, how-

ever, is not this case, for the defendant is resident for venue purposes and comes under the precise language of the law. It is elementary that a debtor can be sued wherever he can be found and wherever he does business, and it is obvious it would be a denial of equal protection of laws and a denial of the privileges and immunities section to say that a non-resident creditor can sue a resident debtor, but that a non-resident F.E.L.A. plaintiff cannot sue a resident debtor, in view of the fact that the Supreme Court of California has held in the *Estate of Waits* the F.E.L.A. creates a debt and the suit can be lodged wherever the debtor can be found.

THE VENUE PROVISION IS AN INHERENT PART OF F.E.L.A.

In line with the humanitarian and liberal purposes of the Act, the plaintiff's right to choose the venue has been considered as a "substantial right" and the United States Supreme Court has said that plaintiff's choice of forum "should rarely be disturbed."

Boyd v. Grand Trunk Western R. Co., 338 U.S. 263, 70 S.Ct. 126, 94 L.Ed. 55;

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055.

Similarly, in *Akerly v. New York Central R. Co.,* 168 Fed.2d 812, the Sixth Circuit judges concur that the F.E.L.A. "makes the venue provision an inherent part of the employers' liability. An attempt to limit it by contract is an attempt to exempt the railroad from liability, and is void."

There is no statute giving state courts the right to transfer or dismiss, and the passage of 1404(a) of Judicial Code required a statutory provision to give the federal Courts limited rights to transfer, but not to dismiss.

THE RAILROAD DEFENDANT IS RESIDENT IN CALIFORNIA FOR VENUE PURPOSES

Since the *Mayfield* case and following the *Pope* case, *Pure Oil Co. v. Suarez* (1966) 384 U.S. 202, 15 L.Ed. 2d 474, 86 S.Ct. 1395, further modified the *Mayfield* and *Price* cases. These cases point out in the light of 28 U.S.C. §1391(c), a Jones Act or an F.E.L.A. defendant is resident wherever it is doing business. 28 U.S.C. §1391(c) provides:

> "A corporation may be sued in any judicial district in which it is incorporated or licensed or is doing business and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Consequently, a motion to transfer on grounds of forum non conveniens is properly denied if the plaintiff chooses to sue the defendant at its residence. In this connection, the United States Supreme Court in *Pure Oil, supra,* goes back to the first point made in this brief as to Congressional intent, and states that the purpose of the law was to give these injured men "substantive rights and a generous choice of forum for their vindication."

Similarly, in *Pierce v. Elk Towing Co.*, 36 F.Rptr. 2d 504, decided on rehearing August 3, 1966, the Cir-

cuit Court of Appeals reversed the lower Court for not applying the expanded revision of the Judicial Code, 28 U.S.C.A. §1391(c) on the authority of United States Supreme Court decision in *Pure Oil v. Suarez,* supra.

In this regard, see *Blanco v. Gulf Coast,* 235 F. Supp. 197 at 201 and the specific provisions of the Jones Act, §688, 46 U.S.C.A., providing that the Jones Act and the Federal Employers' Liability Act are read together.

In line with the *Pure Oil* decision, supra, the more recent cases have been holding that seamen should not be restricted as to where they may look for satisfaction of their rights, and of course the same rule applies under F.E.L.A.

Goodin v. Sinclair Refining Co., 378 Fed.2d 576;
Harley v. Sioux City, 379 Fed.2d 356;
Flaiz v. Moore, 353 S.W.2d 74 (Texas).

In line with *Pure Oil,* saying that ". . . the basic intent of the Congress is best furthered by carrying the broader residence definition of §1391(c) into the Jones Act," and in line with the *Estate of Waits,* supra, in California, holding that a debt is transitory and the F.E.L.A. is such a debt which may be enforced against the debtor wherever you find him, this case does not even apply to the type of litigation mentioned in *Mayfield* or in *Thomson v. Continental Insurance Co.,* 66 Cal.2d 738, that the maxim of forum non conveniens "is typically applied to litigation where all of the parties are out-of-state residents." In *Mayfield* Mr. Justice Jackson speaks of providing a Court "for

two non-resident parties to litigate." In the light of the *Pure Oil* decision and 28 U.S.C. 1329(c), if the defendant is doing business and running a line of railroad in California, California, by this very statute, is to be "regarded as the residence of such corporation for venue purposes."

THIS CASE WOULD NOT EVEN JUSTIFY TRANSFER IN A FEDERAL COURT UNDER JUDICIAL CODE 1404(a) "FOR THE CONVENIENCE OF PARTIES AND WITNESSES IN THE INTERESTS OF JUSTICE."

Our Courts put the burden on the railroad of showing and proving what they claim as to the testimony and convenience of witnesses. Here they have not sustained that burden. They have not shown the nature or relevancy of any alleged testimony.

Dillman v. Superior Court, 205 Cal.App.2d 769, 74 A.L.R.2d 64, 65, citing the general rule in many California cases.

The defense cannot be heard to complain about inconvenience to plaintiff's witnesses. These witnesses establish the liability without any suggested or claimed contradiction by defendant.

Clendenin v. United Fruit Co., 214 Fed.Supp. 137;

Heiser v. United Air Lines, 167 Fed.Supp. 237;

Cline v. New York Central, 193 Fed.Supp. 206;

Marks v. Fireman's Fund Ins. Co., 109 Fed. Supp. 800 at 803.

THIS CASE WOULD NOT JUSTIFY TRANSFER OR DISMISSAL WITH PLAINTIFF'S DOCTORS IN THE FORUM

Further exception has been engrafted on the broad statement of the maxim of "forum non conveniens" in that the maxim will not be applied where there are doctors in the forum who have knowledge of the facts of plaintiff's case whom he may be expected to call to testify on his behalf.

Rothschild v. Superior Court, 216 Cal.App.2d 788, 31 Cal.Rptr. 248;

Peiser v. Mettler, 50 Cal.2d 594, 328 P.2d 593, 74 A.L.R.2d 1;

Planet v. Minneapolis & St. Paul R.R. Co., 143 N.W.2d 641 (Minn.).

This case comes clearly within this exception in that plaintiff's only available or known medical testimony which would be in his favor is in California with the doctors he has seen here in view of the company doctor's claim of "Paget's Disease."

CONCLUSION

The hearing should be granted on this matter so that the rules, particularly as to residence, can be more definitely outlined in the light of the above analysis. This is especially so because of the fact that this case is the first in a series of cases where the trial Court has granted such a motion in an F.E.L.A. case. Similar and inconsistent rulings have been made elsewhere depending on the philosophy of the individual judge in applying this judicial legislation. This ruling is in conflict with the rulings of the various other trial Court judges in the area. It is in conflict with the recent ruling of Judge Kroninger in Alameda County in the case of *Teela v. Great Northern Ry. Co.*, No. 387260, and on various rulings of different judges in San Francisco in the following cases:

Biggs v. Great Northern Ry. Co., Action No. 556714;

Zehetimir v. Great Northern Ry. Co., Action No. 553219;

Erickson v. Great Northern Ry. Co., Action No. 551031;

Keener v. Great Northern Ry. Co., Action No. 569601;

Gibson v. Great Northern Ry. Co., Action No. 571078;

Trent v. Great Northern Ry. Co., Action No. 597342.

In all the above cases except *Teela*, the Great Northern Railway Company applied for writs of mandate to the Appellate Court and to the Supreme Court and such writs were denied without opinion.

We have now begun to reach the point to make applicable the vigorous comment of Mr. Justice Carter at pages 596 to 597 of his dissent in *Price:*

> "The incidental injustice to a railroad in an isolated or exceptional case resulting from the exercise of the right to choose forum is as nothing compared to the chaos, confusion, and gross injustice that results in cases where the plaintiff must first litigate for months on end his venue selection, with affidavits, motions, briefs, hearings, and numerous delays, and with one judge in one particular case sustaining jurisdiction over a certain railroad company and another judge in the adjoining courtroom denying it. To have the venue of actions determined by such a system is not rule by law, but rule by whim and caprice. On the same identical state of facts conflicting and varying decisions may be handed down by different courts and a great volume of litigation is thus bound to rise over preliminary questions."

This liberal Court should not require an F.E.L.A. railroad employee to be thus shoved around and delayed and frustrated in asserting his remedy. This is also contrary to the Congressional intent and the humanitarian purposes of the law. In *Sinkler v. Missouri Pacific R. Co.,* 356 U.S. 326, 2 L.Ed.2d 799, 78 S.Ct. 758, the United States Supreme Court (Brennan, J.) said that the F.E.L.A.

> ". . . was a response to the special needs of railroad workers who are daily exposed to the risks inherent in railroad work and are helpless to provide adequately for their own safety . . . The cost of human injury, an inescapable expense of

> railroading, must be borne by someone, and the F.E.L.A. seeks to adjust that expense equitably between the worker and the carrier . . . The Senate Committee which reported the Act stated that it was designed to achieve the broad purpose of promoting the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden."
>
> *S. Rep. No. 460,* 60th Cong., 1st Session 3.

This outlook is certainly not consistent with the maxim of forum non conveniens as the defense would apply it to require the plaintiff to try two cases to get one decided or to force him to bring his case where the accident happened even though Congress has refused so to legislate.

So this ridiculous maxim has already led us to the point of requiring the injured railroad employee to try two cases to get one decided and is resulting in the obstructing of justice and utter confusion, while the decisions of the lower Court with regard to the Great Northern Railway Company which runs a line of railroad into California have so far been seven to one against the railroad on this maxim. It may well be that in the application of this capricious maxim that other judges in adjoining courtrooms may now follow the single dissenting judge. It is particularly necessary that this Court now make the rulings as to residence as suggested in the *Thomson* case and the *Pure Oil* case so as to give the necessary guidelines to litigants in the lower Courts to avoid this out-

rageous burden cast upon an F.E.L.A. injured plaintiff requiring him to try two cases to get one decided.

We submit that in the light of the *Thomson* case, and the *Pure Oil* case, and the *Rothschild* case that the maxim of "forum non conveniens" is not applicable to a case like the present one where there are medical facts in the forum and where the defendant is a resident under Judicial Code §1391(c). We further submit that if the maxim of "forum non conveniens" makes any sense at all in the light of the legislative intent under the decisions, it would be only as to a case where there was no legal residence or situs for a debt in the forum and the accident happened outside the forum. To give the maxim greater consideration is to recognize the "pretentiousness" of its proponents and to recognize far more than the minimum of sense in the general idea when analyzed as to this particular problem. We respectfully urge that the time has come when the Court should reanalyze and set forth the limitations suggested above particularly by Mr. Justice Peters in *Thomson* and Mr. Justice Traynor in the *Estate of Waits* and by the *Pure Oil* case as to residence and with reference to the legislative purpose of this humanitarian law.

Unless the limitations we outline as to residence and legislative purpose are recognized by this Court and clearly set forth as guides for the future, in the process of forcing an F.E.L.A. plaintiff to try two cases to get one decided and in asking trial and appellate judges by affidavits to resolve niceties requir-

ing "an apothecary's scale and a crystal ball, neither of which instruments are available to the court," much injustice will result and as Mr. Justice Carter foretold in his dissent in *Price* this pretentious maxim of forum non conveniens can become "the most monstrous weapon for obstructing the administration of justice ever conceived by any court or judicial tribunal." This will be achieved by the railroads as to F.E.L.A. injured employees contrary to the legislative intent and by judicial legislation contrary to similar legislation rejected by Congress in the Jennings Bill and by Governor Warren in California in vetoing Senate Bill 789 which purported to incorporate the maxim of forum non conveniens into the law of this state. As to this, Governor Warren said:

> "If we are to whittle away in this manner the benefits conferred by the Federal Employers' Liability Act, it would soon lose its national uniformity and could at least substantially weaken the purposes for which the act was originally designated. I am not advised that other states have enacted such legislation. The fact that this act has been in effect since 1908 without similar legislation being enacted in other states would indicate a nationwide appreciation of the desirability for this uniformity. As all events, if any of the provisions of the act result in a denial of justice to either plaintiffs or defendants, the situation could be remedied nationwide by a simple act of Congress."
>
> *Price v. A.T. & S.F.*, 42 Cal.2d 577, 590, 268 Pac.2d 457 (quoted by Judge Carter without contradiction or opposing comment).

We respectfully request this Court to review this case and to reaffirm the view of the case of *Pope v. Atlantic Coast Lines Railroad Co.*, 345 U.S. 379, 96 L.Ed. 1094, that there is no statutory or other authority for a state Court to dismiss an F.E.L.A. case properly brought under §6 of the Act (45 U.S.C.A., 656).

Dated, Oakland, California,
February 10, 1970.

Respectfully submitted,
CLIFTON HILDEBRAND,
Attorney for Petitioner.

(Appendices Follow)

Appendix A

Superior Court of the State of California
for the County of Alameda

No. 390601

Harvey Franklin Farmer,
Plaintiff,

vs.

Great Northern Railway Company,
a corporation,
Defendant.

JUDGMENT OF DISMISSAL

The motion of defendant Great Northern Railway Company, a corporation, to dismiss the above entitled action, having come on regularly to be heard on the 29th day of October, 1969, Edwin A. Heafey, Jr., of the law firm of Crosby, Heafey, Roach & May Professional Corporation, appearing on behalf of said defendant, and Clifton Hildebrand, of the law firm of Hildebrand, McLeod & Nelson, appearing on behalf of plaintiff; and this Court having made its order dismissing said action, based upon all of the pleadings, papers and documents supporting the motion and upon oral argument; and the Court being fully advised and good cause appearing therefor;

It Is Hereby Ordered, Adjudged and Decreed that judgment of dismissal be duly entered in favor of

defendant Great Northern Railway Company, a corporation.

Dated: November 3, 1969.

Wm. H. Brailsford,
Judge of the Superior Court.

(Endorsed) Filed Nov. 4, 1969.
Jack G. Blue, County Clerk.
By Stan Stidham, Deputy.

Superior Court of the State of California
for the County of Alameda

No. 390601

HARVEY FRANKLIN FARMER,
Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a corporation,
Defendant.

ORDER

Upon reading the declaration of Clifton Hildebrand on file herein, plaintiff is hereby granted an extension of time to and including November 24, 1969, in which to file his Petition for a Writ of Mandate in connection with the above-entitled matter.

November 12, 1969.

/s/ Wm. H. Brailsford,
Judge of the Superior Court.

[Endorsed] Filed November 12, 1969,
Jack G. Blue,
County Clerk
By D. McEachern,
Deputy Clerk.

Appendix B

In the Court of Appeal
State of California
First Appellate District

DIVISION ONE

1 Civil No. 27,563

HARVEY FRANKLIN FARMER,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Real Party in Interest.

BY THE COURT

The petition for a "writ of mandate or other appropriate writ" is denied.

Molinari, P. J.

Filed December 5, 1969,
Lawrence R. Elkington, Clerk.

Appendix C

In the Supreme Court of the State of California
In Bank

Farmer
v.
The Superior Court of the County of Alameda

ORDER DENYING HEARING

After Judgment by the Court of Appeal
1st District, Division 1, Civil No. 27,563

Petition for hearing DENIED.

January 4, 1970.

Traynor,
Chief Justice

Filed Dec. 23, 1969,
William I. Sullivan, Clerk.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1229

HARVEY FRANKLIN FARMER,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Respondent,
(Real Party in Interest).

BRIEF OF RESPONDENT, GREAT NORTHERN RAILWAY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. 1229

HARVEY FRANKLIN FARMER,
Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF ALAMEDA,
Respondent,

GREAT NORTHERN RAILWAY COMPANY, a corporation,
Respondent,
(Real Party in Interest).

BRIEF OF RESPONDENT, GREAT NORTHERN RAILWAY COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTORY

On or about January 30, 1970, the above-named petitioner (hereinafter called "Farmer") filed in this Court a motion and petition for a writ of mandate to

be directed to the Superior Court of California for Alameda County. The proceeding initiated by that motion and petition is identified upon this Court's records as No. 1634-Misc., October Term, 1969. Reference is hereby made to the reply brief in that proceeding filed on or about February 25, 1970, by this respondent (Great Northern) as Real Party in Interest therein.

The instant petition for certiorari involves the same parties and the same facts as No. 1634-Misc., and relies upon largely the same contentions as the petition in that proceeding.

As we show, however, there are certain reasons additional to those set forth in our opposing brief in the mandate proceeding, why the instant petition for certiorari should be denied.

THE FACTS

The essential facts, here again summarized for ready reference, are as follows:

Farmer, the petitioner, was at all material times employed by the respondent Great Northern as a locomotive engineer. On March 14, 1969, at Thama, Idaho, while so employed, he allegedly suffered an injury. Thama is a station on Great Northern's transcontinental main line, about 56 miles east of Spokane, Washington.

Great Northern was at all material times a corporation domiciled and having its principal headquarters in Minnesota, and engaged in business as a com-

mon carrier by railroad in interstate commerce. Great Northern's main lines extend westward from Minnesota to terminals in Washington and Oregon. Its operations in Washington are quite extensive. By contrast, its operations in California are minimal, consisting only of freight-train operations over some 63 miles of line in the extreme northeastern part of California. Farmer is, and at all material times has been, a citizen and resident of Spokane, Washington. So far as known, he has never resided in California.

On June 13, 1969, Farmer commenced an action against Great Northern in the Superior Court of California for Alameda County (the "trial Court"), by filing therein a Complaint for damages for the injuries allegedly suffered at Thama, Idaho, on March 14, 1969. This action was identified as No. 390601, and was expressly stated by Farmer as having been brought under the Federal Employers Liability Act, 45 USCA 51, et seq. ("FELA").

In due course, on October 3, 1969, Great Northern filed its motion to dismiss Farmer's action on the ground of *forum non conveniens*. This motion was based largely upon the decision of the Supreme Court of California in *Price v. A.T. & S.F. Ry. Co.* (1954), 42 C.2d 577, 268 P.2d 457 (cert. denied, 10-14-54, 348 U.S. 839, 99 L.ed. 661).

On October 31, 1969, the Superior Court granted the motion; and on November 3, 1969, formal judgment of dismissal was entered accordingly (see Appendix A to the petition herein). Notice of the entry of said judgment was served on Farmer on or about

November 7, 1969, which date marked the commencement of the 60-day period within which an appeal from the judgment might have been taken (Rule 2(a), *California Rules on Appeal*).

No such appeal was ever taken. Instead, on or about November 24, 1969, Farmer filed in the State Court of Appeal at San Francisco a petition for a "writ of mandate" to require the trial Court "to reverse its ruling" that the action be dismissed, and to "proceed with the action". That petition was denied by the Court of Appeal, without opinion, by order dated and filed on December 5, 1969 (Appendix B to the petition herein).

Farmer thereupon filed in the Supreme Court of California a petition dated December 11, 1969, for a hearing by that Court, after the order entered by the Court of Appeal on December 5, 1969. This petition was denied by the Court, without opinion, by order filed December 23, 1969 (Appendix C).

It should be noted particularly, that on the date last mentioned, Farmer had still until and including January 6, 1970 (i.e., about 14 days) within which he might have appealed from the judgment of dismissal rendered by the trial Court.

ARGUMENT

1. TO THE EXTENT THAT ANY RIGHT OR PRIVILEGE IS HERE ASSERTED UNDER ANY FEDERAL STATUTE, THE ISSUE THUS PRESENTED HAS BEEN SQUARELY DECIDED ADVERSELY TO PETITIONER.

While Farmer's statement of the issue presented here is somewhat confused (his brief, pp. 2-3), his contentions are summarized in his conclusion (brief, p. 28), in essence that "there is no statutory or other authority for a state Court to dismiss an FELA case properly brought under Section 6 of the Act (45 USCA 56)".

This precise claim has been rejected at least twice by this Court. In *Missouri v. Mayfield* (1950), 340 U.S. 1, this Court (at pp. 4-5) said:

> "A State may reject the doctrine of forum non conveniens in suits under the Federal Employers Liability Act because it may deem itself compelled by federal law to reject it. Giving the opinion of the Supreme Court of Missouri in these cases a scope most favorable to reliance on a non-federal ground, doubt still remains whether that Court did not deem itself bound to deny the motions for dismissal on the score of forum non conveniens by its view of the demands of our decisions in Baltimore & Ohio R. Co. v. Kepner, 314 US 44, 86 L ed 28, 62 S Ct 6, 136 ALR 1222, and Miles v. Illinois Cent. R. Co. 315 US 698, 86 L ed 1129, 62 S Ct 827, 146 ALR 1104.
>
> But neither of these cases limited the power of a State to deny access to its courts to persons seeking recovery under the Federal Employers Liability Act if in similar cases the State for reasons of local policy denies resort to its courts

and enforces its policy impartially, see McKnett v. St. Louis & S.F.R. Co. 292 US 230, 78 L ed 1227, so as not to involve a discrimination against Employers Liability Act suits and not to offend against the Privileges-and-Immunities Clause of the Constitution. No such restriction is imposed upon the States merely because the Employers Liability Act empowers their courts to entertain suits arising under it. There was nothing in that Act even prior to Section 1404 (a) of the 1948 revision of the Judicial Code, Title 28, USC, which purported to 'force a duty' upon the State courts to entertain or retain Federal Employers Liability litigation 'against an otherwise valid excuse.' Douglas v. New York, N.H. & H.R. Co., supra (279 US at 388, 73 L ed 752, 49 S Ct 355).

Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. It should be freed to decide the availability of the principle of forum non conveniens in these suits according to its own local law. To that end, we vacate the judgment of the Supreme Court of Missouri and remanded the cause to that Court for further proceedings not inconsistent with this opinion."

Following the *Mayfield* decision, the *Price* case (*Price v. A.T. & S.F. Ry. Co.* (1954), supra (42 C. 2d 577, 268 P.2d 457, 43 A.L.R.2d 756), came before the Supreme Court of California. In its essentials, that case was virtually identical with the case at bench. Price, the plaintiff, was a railroad employee residing in New Mexico. The defendant railroad was

(and is) a corporation organized and domiciled in Kansas, with substantial operations in New Mexico, and like extensive operations, including an important major headquarters, in California. Price brought suit under the FELA, in the Superior Court of California for Los Angeles County, predicated upon alleged accidents occurring in New Mexico. All of the essential witnesses were shown to be located in New Mexico. To carry the similarity further, the attorney who principally represented Price is also the attorney who now principally represents Farmer in the case at bench.

In *Price*, the defendant railroad moved for dismissal on the ground of *forum non conveniens*. As in the case at bench, its motion was granted, and judgment was entered accordingly. Price then appealed to the State Court of Appeal (259 P.2d 664); and following the Appellate Court's decision, the case was brought to the State Supreme Court.

(In contrast with *Price*, in the case at bench no appeal was taken, after judgment of dismissal *forum non conveniens*. Farmer elected instead to proceed in the reviewing Courts of California by petition for mandate.)

In the Supreme Court of California, Price made the same contention now made by Farmer; namely, that he had "an absolute right" to have his case retained in and tried before the Court of his choice in California, once venue was established as provided by Section 56 of FELA (see 42 C.2d, p. 586; and compare pp. 5-7 of Farmer's brief herein). This po-

sition was in line with the earlier decision of the California Court in *Leet v. Union Pac. R. Co.* (1944), 25 C.2d 605, in which it was held that in FELA cases brought in the Courts of California, there was "no room" for the doctrine of *forum non conveniens*, and that in such a case the plaintiff's right to select the forum was absolute.

This holding was, however, squarely overruled by the California Supreme Court in *Price*, in which the Court relied upon and quoted from this Court's opinion in *Mayfield*, saying (42 C.2d, at pp. 583-584):

> "The Leet case, discussed hereinabove, appears to have presented the first instance in which the doctrine of forum non conveniens has been considered and discussed by this court, and as already mentioned we rejected it in connection with the FELA litigation there involved because of our belief that we were so compelled by the decision of the United States Supreme Court in the Miles case. But since that court, in the Mayfield case, has now lifted that compulsion (if it ever intended any), we perceive no reason why the doctrine should not be available in this state, upon a proper showing and without discrimination against either non-citizens of California or against FELA cases."

In due course, Price filed in this Court his petition for certiorari to the Supreme Court of California (No. 180, October Term, 1954). Following a reply filed by the respondent railroad, certiorari was denied without opinion (October 14, 1954), 348 U.S. 839, 99 L.ed. 661.

It may be noted that in the *Price* petition and brief primary reliance was placed upon certain decisions of this Court which are again strongly relied on in Farmer's present petition (pp. 3, 5, 6); particularly:

Baltimore & O. Ry. Co. v. Kepner (1941), 314 U.S. 44, 86 L.ed. 28;

Miles v. Illinois Central R. Co. (1941), 315 U.S. 698, 86 L.ed. 1129;

Pope v. A.C.L. R. Co. (1953), 345 U.S. 379, 97 L.ed. 1094.

It was then Price's argument, and it is now similarly argued by Farmer, that under these decisions a plaintiff-employee in an FELA case has an absolute right to select any forum in which venue can be laid, and that this choice cannot be defeated or disturbed on the ground of *forum non conveniens*.

The simple answer to this contention, and the answer accepted and given effect in both *Mayfield* (by this Court, 340 U.S. at pp. 4-5), and *Price* (by the California Court, 42 C.2d, at pp. 581-582) is that neither *Kepner* nor *Miles* has any bearing upon the application of *forum non conveniens* in an FELA case; and, of course, the same is true of *Pope*, inasmuch as this Court denied review in *Price* even though *Pope*, together with *Kepner* and *Miles*, was cited and relied upon by the petitioner therein.

The right and power of a state Court to dismiss an FELA case on grounds of *forum non conveniens* was more recently recognized in *Parsons v. Chesapeake & O. R. Co.* (1963), 375 U.S. 71, 11 L.ed.2d 137, in which this Court compared the "discretionary

determinations" required in state and federal courts in cases in which such motions are presented. While this Court held, in *Parsons*, that dismissal of an FELA action by a state Court on grounds of *forum non conveniens* was not conclusive upon a federal Court in which an identical action was filed following such dismissal, the Court did not hold, or in any way suggest, that the state Court was not fully empowered to act as it did in the state action; and apparently no such contention was made by either party: see 11 L.ed.2d at pp. 991-992, where the briefs of the litigants are summarized.

Under Section 1257 (3) of Title 28, USCA, and Rule 19 (a) of the Rules of this Court, certiorari to a state Court will not as a rule be granted when a right or privilege is set up or claimed under federal law, unless the federal question decided by the state court is one of substance, which has not heretofore been decided by this Court; or is one which has been decided by the state Court in a way probably not in accord with applicable decisions of this Court.

It has been consistently held that no *substantial* federal question is presented, requiring consideration or review by this Court, when that very question has been settled by previous decisions of this Court. *Leonard v. V.S. & P.R. Co.* (1905), 198 U.S. 416, 49 L.ed. 1108; *Minneapolis, etc. R. Co. v. Merrick* (1920), 254 U.S. 376, 65 L.ed. 312; *Utley v. St. Petersburg* (1933), 292 U.S. 106, 79 L.ed. 1155.

Bypassing for the moment whether a federal question is truly presented, when the only actual question

is whether a trial Court of a state has properly dismissed an FELA complaint on grounds of *forum non conveniens*, it is clear in this case that the federal question, if any, thus presented is not "substantial"; that said question, to the extent that any federal implications are involved, has been determined heretofore by this Court; and that the "decision" of the California Supreme Court is in accord with the applicable decisions of this Court.

It follows that no basis exists for the granting of the petition on the ground that a substantial federal question is presented requiring resolution by this Court.

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2. THE ACTION OF THE STATE COURTS IN THE CASE AT BENCH WAS AN EXERCISE OF POWERS EXISTING UNDER STATE LAW, AND DID NOT GIVE RISE TO ANY FEDERAL QUESTION.

While there is a federal statute (28 U.S. Code, Section 1404-a) which empowers federal Courts to transfer actions from an inconvenient, to a more convenient forum, the state Courts in the case at bench did not undertake to act pursuant to that statute. Instead, the trial Court (whose action was *twice* in effect approved, by the reviewing Courts, by denial of mandate) applied the doctrine of *forum non conveniens*, as developed in the Courts of the several states (and in federal practice, also) long prior to the enactment of Section 1404-a. Compare:

Gulf Oil Co. v. Gilbert (1947), 330 U.S. 501 (504-506), 91 L.ed. 1055;

Broderick v. Rosner (1935), 294 U.S. 629 (643), 79 L.ed. 1100;

Williams v. North Carolina (1942), 317 U.S. 287 (294), 87 L.ed. 279;

Douglas v. N.Y.N.H. & H.R. Co. (1929), 279 U.S. 377, 387, 73 L.ed. 747.

As already shown, this Court, in the *Mayfield* decision, specifically held that whether *forum non conveniens* should be applied in an FELA case brought in a state Court was essentially a question of state rather than federal) law, saying (340 U.S. at p. 4):

> "But if a State chooses to '[prefer] residents in access to often over-crowded courts' and to deny such access to all non-residents, whether its own citizens or those of other States, it is a choice within its own control. This is true also of actions for personal injuries under the Employers Liability Act. Douglas v. New York, N. H. & H. R. Co., 279 US 377, 387, 73 L ed 747, 751, 49 S Ct 355. Whether a State makes such a choice is, like its acceptance or rejection of the doctrine of forum non conveniens, a question of State law not open to review here."

The correctness of the decision of the California Court in *Price,* and thus in the case at bench, is attested by not only this Court's denial of certiorari in *Price,* but also numerous decisions in the courts of review in the several states in which similar action was taken. Typical decisions of this kind include:

Gonzales v. A.T. & S.F. Ry. Co. (1962), 189 Kan. 689, 371 P.2d 193 (citing *Price,* 371 P.2d 197);

C. & O. Ry. Co. v. Donovan (1964), 30 Ill.2d 178, 195 N.E.2d 634;

Johnson v. C.B. & Q.R. Co. (Minn., 1954), 66 N.W.2d 763 (citing *Price,* 66 N.W.2d, pp. 774-775);

Ramsey v. C.G.W.R. Co. (Minn., 1957), 77 N. W.2d 176;

Maynard v. C. & N.W.R. Co. (Minn., 1957), 77 N.W.2d 183;

St. Louis-S.F. Ry. Co. v. Superior Court (Okla., 1955), 290 P.2d 118;

A.T. & S.F. Ry. Co. v. District Court (Okla., 1956), 298 P.2d 427;

Murman v. Wabash R. Co. (1927), 246 N.Y. 244, 158 NE. 508, 54 A.L.R. 1522;

Mooney v. D. & R. G. W. R. Co. (1950), 118 Utah 307, 221 P.2d 628;

Southern Ry. Co. v. McCubbins (Fla. App. Ct., 1967), 196 So.2d 512, 514-516;

Elliott v. Johnson (1956), 365 Mo. 881, 292 S.W.2d 589.

Farmer's argument is essentially that the *Mayfield* and *Price* decisions should nevertheless be disregarded, because (as he asserts) *venue* of his action was properly laid in the trial Court; that under FELA, and the decision of this Court in *Pure Oil Co. v. Suarez* (1966), 384 U.S. 202, 15 L.ed.2d 474, Great Northern is a "resident of California for *venue* purposes"; and such venue "residence" removes this case from the application of either the *Mayfield* or *Price* decisions.

To this argument there are two conclusive answers: (1) the *Pure Oil* case had nothing to do with a trans-

fer of an action, *forum non conveniens,* or with the FELA; in fact, neither was referred to in the opinion, even in passing; (2) questions of *venue* are irrelevant to the application of *forum non conveniens,* except that venue must exist, in order that dismissal or transfer on grounds of *forum non conveniens* may be ordered. In the *Gulf Oil* case this Court declared (330 U.S., at pp. 504, 506-507):

> "It is conceded that the venue statutes of the United States permitted the plaintiff to commence his action in the Southern District of New York and empower that court to entertain it. But that does not settle the question whether it must do so. Indeed, the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue. . . .
>
> . . .
>
> In all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them."

This statement of the law was accepted and relied upon by the Supreme Court of California, in the *Price* decision (42 C.2d, at pp. 580-581).

In this behalf, reference may be had again to the *Parson* case, *supra* (375 U.S. 71, 11 L.ed.2d 137), in which this Court apparently recognized the propriety of dismissal by a state court of an FELA case on grounds of *forum non conveniens,* notwithstanding that venue was properly laid.

3. THE DECISION OF THE SUPREME COURT OF CALIFORNIA SOUGHT TO BE REVIEWED RESTS UPON NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT, AND CERTIORARI MUST THEREFORE BE DENIED.

The "judgment" which Farmer here seeks to have reviewed is in terms, and in fact, a simple order (without opinion) entered by the Supreme Court of California on December 23, 1969 (Appendix C to Farmer's petition to this Court). By that order, the Court denied Farmer's petition to that Court for a hearing, following the denial (on December 5, 1969) of his petition to the State Court of Appeal for a writ of mandate directed to the trial Court.

As stated in the petition to this Court, Farmer's petition for mandate was assertedly based upon Section 400 of the Code of Civil Procedure of California. The judgment of the trial Court which Farmer thus attacked had been entered on November 3, 1969, and notice thereof had been served upon him on or prior to November 7, 1969.

While neither the order of December 23, 1969 (by the California Supreme Court) nor the order of December 5, 1969 (by the Court of Appeal) contain any specification of the reasons which persuaded those Courts to act as they did, there are at least two distinct non-federal grounds, each of which is independently adequate to support those orders; and each of said grounds is likewise independent of any consideration of any federal question which may or might be claimed to be presented here.

These two non-federal grounds are:

(a) There was no basis in Section 400, California Code of Civil Procedure, for the procedure by mandate attempted by Farmer;

(b) Apart from Section 400, it is the settled statutory and decisional law of California that a litigant may not proceed by mandate, to correct a supposedly erroneous judgment of a trial Court, when he has a plain, speedy and adequate remedy by appeal.

Section 400 by its terms provides only for a procedure to be followed when a Superior Court (such as the trial Court here) has made an *interlocutory* order "*granting or denying* a motion to change the place of trial" of an action. No such motion was presented to the trial Court in this case, nor was any such order made. The trial Court's "order" was for the entry of "judgment of dismissal"; and such judgment was duly entered on November 3, 1969, as stated above. No decision of the California courts of review has been cited, and none has come to the attention of Great Northern's counsel, in which the procedure under Section 400 has been approved, where a final judgment was under attack. The decision cited by Farmer at page 4 of his petition (*State Farm etc. Co. v. Superior Court* (1956), 47 C.2d 428) involved only an interlocutory order preliminary to trial, and even then did not involve Section 400 in any way.

Apart from Farmer's misconception of the applicability of Section 400, his petition for mandate was

wholly improper because at the time of its presentation he had a plain, speedy and adequate remedy by appeal from the trial Court's judgment of November 3, 1969. Under Rule 2(a) of the California Rules on Appeal, an appeal may be taken from a judgment rendered by a Superior Court, by filing a written notice of appeal with the clerk of that Court within 60 days after the receipt of notice of entry. Farmer thus might have appealed at any time up to a date not earlier than January 6, 1970. He did not do so, but instead elected to proceed by petition for mandate, filed as above stated in the State Court of Appeal on or about October 27, 1969.

There is not and never has been in this case any claim that Farmer did not have a remedy by appeal from the trial Court's judgment, or that this remedy was not plain, speedy and adequate. Notably, in the *Price* case, where the same attorneys who now represent Farmer were counsel for the plaintiff Price, an appeal was taken to the Court of Appeal from the trial Court's judgment of dismissal (42 C.2d, p. 579).

The governing statute of California contemplates that a writ of mandate will not be issued when there is a plain, speedy and adequate remedy by appeal: *Code of Civil Procedure*, Section 1086; *Andrews v. Police Court* (1943), 21 C.2d 479; *Butler v. Superior Court* (1927), 82 C.A. 322. In particular, it is the rule of decision in California that a litigant may not resort to mandate as a substitute for appeal: *Neal v. State* (1960), 55 C.2d 11, 15; *Lincoln v. Superior Court* (1943), 22 C.2d 304, 311; *Early v. Mannix*

(1860), 15 Cal. 149, 150; *Wadey v. Justice Court* (1959), 176 C.A.2d 426, 428.

While the challenged order of the Supreme Court of California does not in terms specify that the petition was denied because predicated upon an inapplicable statute, or because mandate was inappropriate in a case where a remedy by appeal was or had been available, there can be no question but that these factors were duly considered by the Court. The experienced Justices who comprise that Court are not unaware of the pronouncements in the earlier cases, cited *ante*, in which mandate has been held not to be available as a substitute for an appeal. The Court's omission of a specific declaration to that effect in conjunction with its denial of mandate is therefore not of particular significance.

This Court has many times held that the question whether, in a case brought before this Court for review, the state Court's decision could be rested upon independent state grounds did not necessarily require an express declaration to that effect by the state Court; rather, the basic question was whether a decision upon a federal issue was essential to the state Court's ruling, or whether, on the other hand, the ruling could be supported entirely on state grounds irrespective of the decision of the supposed federal question. This Court has indicated that in passing upon this fundamental question, the circumstances disclosed of record are to be considered, especially if the state Court has not expressed its views in a formal opinion or set of conclusions. *Rich-*

ardson Machine Co. v. Scott (1928), 276 U.S. 128, 133; *New York v. Atwell* (1923), 261 U.S. 590, 592; *Radio Station W.O.W. v. Johnson* (1945), 326 U.S. 120, 129.

More succinctly stated, the rule is that review by this Court may not be had, unless it affirmatively appears on the face of the record that a federal question was duly presented to the State Court, and was expressly or necessarily decided by that Court. *Whitney v. California* (1927), 274 U.S. 357, 360; compare: *Herb v. Pitcairn* (1945), 324 U.S. 117, 128; *Buck v. California* (1952), 343 U.S. 99, 103.

No such affirmative showing appears in this record. To the contrary, and irrespective of the supposed federal question asserted by Farmer, the "decision" of the Supreme Court was completely supportable on the ground that Farmer, by seeking to proceed under Section 400, C.C.P., had misconceived his remedy, or the equally valid ground that under state law and practice mandate is not available as a substitute for appeal, or when a plain, speedy and adequate remedy by appeal is or has been available. It follows that no basis is presented for the exercise of this Court's jurisdiction, and that the petition should be denied.

CONCLUSION

The petition herein, like the petition for mandate in No. 1634-Misc., presented during this term by this same petitioner, is for the sole purpose of obtaining the reversal of this Court's decision in the *Mayfield* case, and the subsequent decision of the California Supreme Court in the *Price* case (in which this Court denied review, as shown above). Nothing new is presented which would warrant such action by this Court. In fact, the instant petition is in large part a repetition of the petition for review filed with this Court in the *Price* case; and that petition was in turn largely a reproduction of the dissenting opinion in *Price* (42 C.2d at pp. 587-601).

For each and all of the reasons set forth herein, the petition should be denied.

Dated, Oakland, California,
March 20, 1970.

Respectfully submitted,
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